Supreme Court No. S209836
2nd Civil No. B235409
LASC No. VC058225

**IN THE**

**SUPREME COURT OF CALIFORNIA**

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CATHERINE FLORES,

PLAINTIFF AND APPELLANT

v.

PRESBYTERIAN INTERCOMMUNITY HOSPITAL,

DEFENDANT AND RESPONDENT

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After a Decision by
The Court of Appeal, Second Appellate District
Case No. B235409

---

# ANSWER TO PETITION FOR REVIEW

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Edward W. Lloyd, Attorney
State Bar # 92795
EDWARD W. LLOYD & ASSOCIATES
2900 Adams Street, #C130
Riverside, California 92504
951.656.1203
lawewl@aol.com
Attorney for Plaintiff/Respondent

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Supreme Court No. S209836
2nd Civil No. B235409
Los Angeles County Superior Court No. VC058225

**SUPREME COURT OF CALIFORNIA**

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v.

PRESBYTERIAN INTERCOMMUNITY HOSPITAL

Defendant and Respondent

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# ANSWER TO PETITION FOR REVIEW

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## INTRODUCTION

The instant Petition for Review involves an unremarkable appeal in an action for damages prosecuted by Plaintiff and Appellant, Catherine Flores, against Presbyterian Intercommunity Hospital as a result of a fall she sustained when bedrails on a hospital bed collapsed. The action was filed in compliance with the general personal injury statute of limitations (two years). Hospital

demurred, arguing the one year statute of limitations for medical malpractice applied by reason of which the action was time-barred. The ruling of the Trial Court sustaining the demurrer was overruled by the Appellate Court which found no reason for invoking the procedural requirements of a medical malpractice action, finding the action to be one of ordinary negligence.

Hospital relied upon the one-year statute of limitations set forth in Code of Civil Procedure sec. 340.5 which section defines "professional negligence" as:

> "..a negligent act or omission to act by a health care provider in the rendering of **professional services** which act or omission is the proximate cause of a personal injury or wrongful death, provided that such services are within the scope of the **services** for which the provider is licensed and which are not within any restrictions imposed by the licensing agency or licensed hospital." (emphasis added)

Of importance to this Court is the very limited nature of the holding rendered by the Appellate Court, which limited nature renders the subject appeal very unremarkable. In footnote 6, the Appellate Court made the limitations of its ruling crystal clear:

> "In her opposition to the *demurrer*, Flores theorized the bed rail

collapsed either due to 'neglectful latching' by an employee of the Hospital, or because the Hospital 'negligently maintained ' the locking mechanism on the bed rail. However, Flores's complaint did not plead negligent latching of the bed rail as an alternative theory. Had 'negligent latching' been pled in the complaint, that theory would be time-barred. Neglectful latching of the bed rail would constitute a negligent act or omission in the rendering of **professional services**, so as to be subject to the one-year statute for professional negligence. (sec. 340.5, subd. (2))" [Opinion: pg. 16, fn. 6] (emphasis added)

The Appellate Court's very limited ruling, then, was based upon the proper observation that:

"...Flores's complaint, which alleged she was injured 'when the bed rail collapsed causing her to fall to the ground,' sounds in ordinary negligence because the negligence did not occur in the rendering of personal services. As pled in the operative complaint, the alleged negligence was the Hospital's failure 'to use reasonable care in maintaining [its] premises and fail[ing] to make a reasonable inspection of the equipment and premises, which were open to Plaintiff and the public, and fail[ing] to take

reasonable precautions to discover and make safe a dangerous condition on the premises. Therefore, the action is governed by the two-year statute of limitations [sec. 335.1] making the lawsuit timely." [Opinion: pg. 16]

The Appellate Court found, and rightfully so, that Flores did not claim that her injury was proximately or otherwise caused by any act of Hospital in the rendition of professional services. Instead, it recognized that she claimed her injuries were caused by the failure of Hospital to maintain its premises in a reasonable condition. It expressly held and duly noted that had Flores claimed her injuries were due to negligent latching of the bed rail, her claim would have been within the ambit of the rendition of professional services and time-barred by Code of Civil Procedure sec. 340.5.

Two lines of cases were discussed in this appeal. In Gopaul v. Herrick Memorial Hospital (1974) 38 Cal. App. 3d 1002, the Appellate Court held that the negligent failure to raise bed rails was ordinary negligence for purposes of procedural distinctions between ordinary and professional negligence. In Murillo v. Good Samaritan Hospital (1979) 99 Cal. App. 3d 50, the Appellate Court held that the negligent failure to raise bed rails was professional negligence for purposes of procedural distinctions between ordinary and professional negligence. Each case, however, involved the rendition of

professional services. As a part of the professional duties of the health care providers involved, each was charged with a professional duty to medically evaluate the condition of their patients and make a medical determination if bed rails were or were not required. This was a professional service.

This neither was nor is the issue involved in the case at bar. No claim was made that professional services were negligently administered. Instead, Plaintiff claimed that Hospital negligently maintained its services.

In the sections which follow, Flores will demonstrate that the Petition is meritless for three reasons: (1) the Petition will not serve to settle an important question of law (CRC 8.500(b)(1); (2) the Petition will not serve to secure uniformity of decision (CRC 8.500(b)(1); and this case of Flores v. Presbyterian Intercommunity Hospital is the improper vehicle to resolve the conflicts posed by Gopaul and Murillo.

## LEGAL DISCUSSION

### I. REVIEW OF THE CHALLENGED APPELLATE COURT RULING WILL NOT SERVE TO SETTLE AN IMPORTANT QUESTION OF LAW:

#### A. Applicable Rule of Law:

Pursuant to California Rules of Court, Rule 8.500(b)(1), the Supreme

Court may review a Court of Appeal decision when necessary to settle an important question of law.

**B. Legal Analysis:**

The Trial Court, and subsequently the Court of Appeal, were called upon to determine what statute of limitations applied to the case presented. The Trial Court determined the proper statute of limitation was that contained in the MICRA provision, i.e. Code of Civil Procedure sec. 340.5. This specialized statute reads as follows:

> "In an action for injury or death against a health care provider based upon such person's alleged professional negligence, the time for commencement of action shall be three years after the date of injury or one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury, whichever occurs first."

Code of Civil Procedure sec. 340.5 then goes on to define "Professional Negligence" as follows:

> "'Professional negligence' means a negligent act or omission to act by a health care provider **in the rendering of professional services**, which act or omission is the proximate cause of a personal injury or wrongful death, provided that such **services**

are within the scope of **services** for which the provider is licensed and which are not within any restriction imposed by the licensing agency or licensed hospital." (emphasis added)

The statute is clear. It pertains to and controls cases of professional negligence defined as a negligent act or omission in the rendering of professional **services**.

From time to time, the Courts of this State have been asked to decide what services, for purposes of ascertaining the applicable statute of limitations, are professional in nature. As noted by this Court in the case of Flowers v. Torrance Memorial Hospital Medical Center (1994) 8 Cal. 4th 992, a conflict exists at the Appellate Court level as to the definition of "professional negligence" as contained in Code of Civil Procedure sec. 430.5. Most appropo, the two cases noted to be in conflict each involved cases where a plaintiff fell from a hospital gurney where the side rails had not been raised. As observed by this Court:

> "Two decisions of the Courts of Appeal have addressed the question of whether a patient's fall from a hospital bed or gurney constituted 'ordinary' or 'professional' negligence. In *Gopaul v. Herrick Memorial Hospital*, supra, the court determined that 'professional malpractice' was not involved

> because 'the situation required no professional skill, prudence and diligence and the need to strap plaintiff to a gurney while she was ill and unattended would have been obvious to all. (citations omitted) In *Murillo v. Good Samaritan Hospital*, supra, the court reached a contrary conclusion, finding that the decision whether or not to raise the bedrails on the plaintiff's bed came within the hospital's duty to use reasonable care and diligence in safeguarding a patient committed to its charge and such care and diligence are measured by the capacity of the patient to care for himself." (Flowers v. Torrance Memorial Hospital Medical Center, supra, at 999.)

Although recognizing the conflict among the Appellate Courts as to what services constituted professional services, the Supreme Court noted that the distinction between ordinary and professional negligence was not presented in the case before it by reason of which "...we decline the urgings of amicus curiae to address that question as it relates to various provisions of MICRA." (Flowers v. Torrance Memorial Hospital Medical Center, supra, at 1000, FN 3.)

In Gopaul v. Herrick Memorial Hospital, supra, at 1005-1008, the Appellate Court formulated a test which focused on the nature of the act. The

Court there held that inherent in the concept of "professional negligence" is that it must have occurred in the performance of professional duties. (Gopaul v. Herrick Memorial Hospital, supra, at 1006-1006.)

In Murillo v. Good Samaritan Hospital, supra, at 57, the Appellate Court formulated the following test: "...the test is whether the negligent act occurred in the rendering of **services** for which the health care provider is licensed." (emphasis added)

Of prime import is the following: 1) Gopaul and Murillo disagree as to what **services** rendered by a health care provider are professional and what **services** are non-professional in nature and thus controlled or not controlled by MICRA; both agree, however, that "professional negligence" as controlled by MICRA involves the rendition of **services** and services only. After all, MICRA defines professional negligence as controlled by MICRA as:

> "'Professional negligence' means a negligent act or omission to act by a health care provider in the rendering of professional **services**, which act or omission is the proximate cause of a personal injury or wrongful death, provided that such services are within the scope of services for which the provider is licensed and which are not within any restriction imposed by the licensing agency or licensed hospital." (Code of Civil Procedure

sec. 340.5) (emphasis added)

The holding of the Appellate Court in this case (Flores) would arguably be remarkable if it involved a decision asking and answering the oft repeated question as to what services provided by a health care provider are "professional" and what services are not. It, however, neither asks nor answers that question. As a result, this case is instead an un-remarkable case which does not require the attention of this Court. As the Court observed in Flowers v. Torrance Memorial Hospital Medical Center, supra, the issue here is once again not squarely presented and the Court need not therefore answer it.

The Appellate Court's ruling in the case at bar was very limited in nature. That ruling included the following limiting language:

> "...Flores's complaint, which alleged she was injured 'when the bed rail collapsed causing her to fall to the ground,' sounds in ordinary negligence because the negligence did not occur in the rendering of personal **services**. As pled in the operative complaint, the alleged negligence was the Hospital's failure 'to use reasonable care in maintaining [its] premises and fail[ing] to make a reasonable inspection of the equipment and premises, which were open to Plaintiff and the public, and fail[ing] to take

reasonable precautions to discover and make safe a dangerous condition on the premises. Therefore, the action is governed by the two-year statute of limitations [sec. 335.1] making the lawsuit timely." [Opinion: pg. 16]

The Appellate Court found, and rightfully so, that Flores did not claim that her injury was proximately or otherwise caused by any act of Hospital in the rendition of professional **services**. Instead, it recognized that she claimed her injuries were caused by the failure of Hospital to maintain its premises in a reasonable condition. It expressly held and duly noted that had Flores claimed her injuries were due to negligent latching of the bed rail, her claim would have been within the ambit of the rendition of professional s**ervice**s and time-barred by Code of Civil Procedure sec. 340.5.

In its Petition for Review, Hospital contends that this Appeal involves far-reaching industry-wide standards reflecting on the public policy of the State of California as expressed in the MICRA statutes. It does not. Contrary to what Hospital contends, an expanded definition of "professional negligence" beyond the statutory definition of "'Professional negligence' means a negligent act or omission to act by a health care provider in the rendering of professional services..." was not asked for nor provided in the Opinion of the Appellate Court.

The Appellate Court, like this Court in Flores, found that the issue of further defining "professional negligence" was not squarely presented because:

> "...Flores's complaint, which alleged she was injured 'when the bed rail collapsed causing her to fall to the ground,' sounds in ordinary negligence because the negligence did not occur in the rendering of personal **services**. [Opinion: pg. 16] (emphasis added)

This case is, therefore, un-remarkable. The time and attention of this Court should be reserved for remarkable cases which truly pose questions affecting substantial public policy matters of concern to the general population of this State.

## II. REVIEW OF THE CHALLENGED APPELLATE COURT RULING WILL NOT SERVE TO SECURE UNIFORMITY OF DECISION:

### A. Applicable Rule of Law:

Pursuant to California Rules of Court, Rule 8.500(b)(1), the Supreme Court may review a Court of Appeal decision when necessary to secure uniformity of decision.

### B. Legal Analysis:

Flores would readily admit that there is a conflict in the decisions

rendered in Gopaul and Murillo upon the facts peculiar to those cases as to what the definition of professional services is. As observed above, that issue is not before this Court as the holding of the Appellate Court was limited in nature and properly reached without resolving that issue. Even were that issue applicable, however, the ruling in Flores does not conflict with the holding in Murillo and its progeny.

When the present case is factually compared to and analyzed in light of the decision in Murillo, it becomes apparent that there is no conflict in these two decisions (i.e. Flores and Murillo) whatsoever. In fact, the holding of the Appellate Court in Murillo is quite supportive of the ruling in Flores and there is no conflict in decisions to be resolved by this Court under Rule of Court 8.500(b)(1).

The Gopaul test for professional services differs from the Murillo test. Even were the present case analyzed from the standpoint of the Murillo test, however, the result would be the same. Flores would still be found the victim of ordinary and not professional negligence. As a result, there is no conflict or lack of uniformity demonstrated by the holding in Flores and that of Murillo. Yes, Gopaul and Murillo present a conflict in the test of what constitutes "professional negligence" in the rendition of services. Flores and Murillo, under their particularized facts, however, are perfectly compatible.

There is neither conflict nor need for resolution to preserve uniformity of decisions as respects Flores and Murillo.

The facts presented in the Murillo case are substantially different from the case before this Court such that even were a Murillo test applied to the case at bar, professional negligence would not be found and Flores would prevail. In Murillo, the defendant hospital "...argued that the alleged negligent act-failure to raise the bedrails-was ordinary negligence rather than professional negligence." (Murillo v. Good Samaritan Hospital, supra, at 53.) The Appellate Court noted this when it framed the issues presented to it.

> "In the present case, the question whether it was negligent to leave the bedrails down during the night while plaintiff was asleep is a question involving the hospital's duties to recognize the condition of patients under its care and to take appropriate measures for their safety. Thus, the question is squarely one of professional negligence." (Murillo v. Good Samaritan Hospital, supra, at 56.)

The Murillo Court expressly noted that the hospital had a professional duty to assess and recognize the medical condition of the patient. This involved the exercise of medical skill, prudence and diligence. No layperson could assess a patient to properly decide the need or lack of need for bed rails.

This was in fact a medical decision, i.e. does this patient, considering her medical condition, require the use of raised bed rails? The Murillo Court also noted that after arriving at a medical assessment of the patient, the hospital had a duty to take medically appropriate steps to insure the patient's safety.

The holding in Murillo was based upon a finding of two separate duties, one involving professional skill, the other ordinary care:

> "In the present case, the question whether it was negligent to leave the bedrails down during the night while plaintiff was asleep is a question involving hospital's duties to recognize the condition of patients under its care and to take appropriate measures for their safety. Thus, the question is squarely one of professional negligence..." (Murillo, supra, at 56)

This, the very fact relied upon by Murillo to find professional negligence, is the very fact which is not present in the case at bar. Here, we are presented with no "...**question involving hospital's duties to recognize the condition of patients under its care**". The decision to employ bed rails had been made by the medical staff of Hospital and had been properly made. That decision was to employ bed rails and bed rails were employed. In the case at bar, we have no issue or claim for professional negligence in medically

assessing Flores's condition and determining the need for bed rails. What Hospital failed in was exercising ordinary care to maintain its premises (bed rails) in a safe condition.

As noted by the Appellate Court in its holding in footnote 6, this involved ordinary negligent maintenance of the latching mechanism and not a medical service, i.e. assessing the patient's condition or negligent latching. The holding of the Appellate Court was extremely limited to the facts presented, i.e. ordinary negligence in maintaining its premises and not in the rendition of any service.

Each of the cases presented by Hospital in its Respondent's Brief involved negligence in assessing the condition of a patient and negligently determining no need for the use of bed rails. This involved a professional, medical decision. These decisions required the professional skill, prudence and diligence of a medically trained person exercising the specialized skill of a similarly employed person in the medical community.

Flores's case presents factually at a time after the professional medical assessment was made and an appropriate decision was made to raise the bed rails. This decision making involved professional, medical judgment. Once the decision was made, however, the boundary was crossed from professional negligence to ordinary negligence. No lack of medical skill proximately

resulted in the bed rail collapsing. It collapsed because of ordinary negligence in its maintenance.

Of note are various hypothetical situations described in Gopaul and commented upon by Murillo, which further demonstrates the total lack of conflict between the holdings of Flores and Murillo. The Gopaul Court reasoned that no reasonable person would suggest that "professional malpractice" was the cause of injury to a patient from a collapsing chair in a doctor's office...". (Gopaul v. Herrick Memorial Hospital of Anaheim, supra, at 1006.) Murillo agreed with that proposition. It stated that "The professional duty of a doctor lies in the area of diagnosis and treatment of disease and the condition of a waiting room falls outside the scope of the doctor's professional responsibility" (Murillo v. Good Samaritan Hospital, supra, at 56.)

The Murillo Court thus agreed with the proposition that an injury from a collapsing chair in a reception room could not possibly constitute medical malpractice. Murillo is thus directly aligned with the Court in Flores which mimicked the sentiment that a collapsing bed rail did not amount to professional negligence. There is no conflict between Flores and Murillo and its progeny to be resolved.

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## III. THE CASE OF FLORES V. PRESBYTERIAN INTERCOMMUNITY HOSPITAL IS NOT THE VEHICLE TO RESOLVE THE CONFLICTS BETWEEN GOPAUL AND MURILLO NOR TO DETERMINE THE PROPER LEGAL DEFINITION OF PROFESSIONAL NEGLIGENCE:

Flores would admit that a conflict and lack of uniformity exists between Gopaul and its progeny on one side and Murillo and its progeny on the other with respect to the definition "professional negligence in the rendition of professional services". The instant case, however, is not the proper vehicle for resolution of these issues. As this Court previously noted in Flowers v. Torrance Memorial Hospital Medical Center, supra, the issue is not squarely presented by the case presently before it by reason of which any such decision should be deferred until such time as it arises.

The issue of an expanded definition of what services rendered by a health care provider are professional in nature and which are lay in nature was not decided by the Appellate Court in Flores. Instead, it resolved the issues presented to it by quite simply observing that the patient was not complaining of any injury caused by the rendition of services, professional or non-professional.

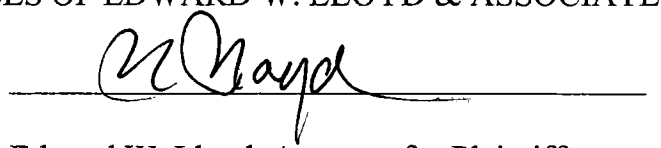
Some day, some time, this Court may be called upon to resolve this

issue. It may be called upon to determine if the negligence of a Candy-Striper in spilling scalding tea on the lap of a bedridden patient is "professional" negligence just the same as a surgeon removing the wrong limb. This is the issue that Gopaul and Murillo perhaps beg. This issue, however, is neither presented nor resolved by the holding in Flores. Flores is not the vehicle for resolution of these issues which are not relevant to its determination.

As noted in Civil Code sec. 3532, "The law neither does nor requires idle acts." It would be an idle act indeed to here decide an "issue" which was in fact not an issue. It would be an idle act indeed to review a ruling that was neither made nor necessary.

Dated: April 23, 2013

LAW OFFICES OF EDWARD W. LLOYD & ASSOCIATES



Edward W. Lloyd, Attorney for Plaintiff

**CERTIFICATE OF WORD COUNT**

**(Cal. Rules of Court, rule 8.504(d)(1))**

The text of this Appellant'S Opening Brief consists of 3735 words as counted by the Corel WordPerfect version 9 word-processing program used to generate the Brief.

Dated: April 23, 2013

Edward W. Lloyd, Attorney

## VERIFICATION

STATE OF CALIFORNIA, COUNTY OF

I have read the foregoing _____

_____ and know its contents.

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I am a party to this action. The matters stated in the foregoing document are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.

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Kristen J. Heim/Peter M. Fonda, Attorneys
FONDA & FRASER, LLP
1925 Century Park East, Suite 1360
Los Angeles, California 90067-2701
Anaheim, California 92806-6189

Attorneys for Respondent- One (1) Copy

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COUNTY OF LOS ANGELES
Clerk of the Court-Dept. C
Southeast Judicial District
12720 Norwalk Blvd.
Norwalk, California 90650
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